IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 18, 2009 Session

STATE OF TENNESSEE V. JAMARCUS SYDNOR

Appeal from the Circuit Court for Rutherford County
No. F-61888 David Bragg, Judge

No. M2009-00947-CCA-R3-CD - Filed Janaury 25, 2010

Appellant, Jamarcus R. Sydnor, was indicted by the Rutherford County Grand Jury for attempted second degree murder, three counts of aggravated assault, attempted aggravated robbery, reckless endangerment with a weapon, and use of a firearm during the commission of a felony. Prior to trial, Appellant pled guilty to two counts of aggravated assault, one count of attempted aggravated robbery, and one count of reckless endangerment with a weapon. The trial court sentenced Appellant to an effective sentence of five years and denied Appellant's request for an alternative sentence. On appeal, Appellant challenges the trial court's denial of an alternative sentence. After a review of the record, we determine that the trial court failed to place the reasons for the denial of an alternative sentence on the record. Therefore, we reverse and remand the judgments of the trial court. On remand, should the trial court determine that a denial of alternative sentencing is appropriate, the trial court should place the reasons for the denial of alternative sentencing on the record.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Reversed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and CAMILLE R. MCMULLEN, JJ., joined.

James O. Martin, III, Nashville, Tennessee, for the appellant, Jamarcus Sydnor.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General, and Trevor Lynch, Assistant District Attorney General for the appellee, State of Tennessee.

OPINION

Factual Background

Appellant was indicted in August of 2008 by the Rutherford County Grand Jury for attempted second degree murder, three counts of aggravated assault, attempted aggravated robbery, reckless endangerment with a weapon, and use of a firearm during the commission of a felony. In October of 2008, Appellant entered a plea of guilty to two counts of aggravated assault, one count of attempted aggravated robbery, and one count of reckless endangerment with a weapon. In exchange for the guilty pleas, the State agreed to dismiss the charges of attempted second degree murder, one count of aggravated assault, and one count of possession of a firearm during the commission of a felony.

At the guilty plea hearing, counsel for the State informed the trial court that, had the case gone to trial, the evidence would have shown:

> [O]n or about March 26th of 2008, Detective Jeff Truong with the LaVergne Police Department was investigating a shooting on Center Street. He made contact with Mr. Sydnor, who was detained by the patrol officers at the scene of the shooting.
>
> Mr. Sydnor was taken into the booking where he confessed to his involvement in the shooting. He stated to the officers that it was his intent to rob Austin Lecroix in that there was either money owed or a drug transaction going on at that time.
>
> Mr. Sydnor arrived with a firearm. During that transaction he was wearing latex gloves during the shooting. Mr. Sydnor's position, I believe, would be that when he arrived and there was a confrontation, the other individuals began shooting at him and he shot back. However it went down, the individual that was shot, Mr. Jordan Reeves, was not involved in the shooting, did not have a weapon.
>
> I believe Mr. Lecroix may have had a firearm, and there were rounds exchanged. As far as who shot first, Judge, that's just for this matter it's just a he said/he said kind of situation. There's no way to determine who actually shot first. Witnesses on the scene however did say that the shots came from outside before anyone returned fire from where they were located. Mr. Sydnor, I believe, would contest that.

In exchange for pleading guilty, the trial court sentenced Appellant to five years for each conviction for aggravated assault, five years for attempted aggravated robbery, and two years for reckless endangerment with a deadly weapon. The trial court ordered the sentences to run concurrently, and agreed to take up the matter of alternative sentencing at a later hearing. The remaining charges were dismissed.

At the sentencing hearing, the State presented the testimony of Jeff Truong with the La Vergne Police Department. Officer Truong testified that Appellant told him his intentions were to rob Austin Lecroix, one of the victims, because he owed Appellant money from a previous drug transaction. Appellant went to Mr. Lecroix's residence to collect the money and gunfire "arose." It was not clear from the investigation who fired the first shots. Appellant fired shots from a concealed location near a treeline next to the victim's residence.

Jordan Reeves, one of the victims, was at Mr. Lecroix's house on the day of the incident to "ride dirt bikes." Mr. Reeves claimed that he did not take or sell drugs but was aware that Mr. Lecroix used drugs. Sometime a few hours later, Appellant's girlfriend came to the residence to buy drugs. Mr. Reeves and his girlfriend decided to leave at that time. When they were leaving, a car pulled up to the vacant house next door. Mr. Reeves saw "one or two people" running up to that house who were in "black" and wearing "ski masks." Mr. Reeves heard these people running around and then heard shots fired so he ran from the area.

Mr. Reeves witnessed Mr. Lecroix with a gun but did not see him fire the weapon. Mr. Reeves realized that he had been shot while he was running. He drove himself to the hospital.

Another victim, Heather Denson, corroborated Mr. Reeves's story about the incident. She was hit by a bullet fired by Appellant that had richocheted off of something. She suffered a large bruise as a result of the incident.

Appellant testified at the hearing. According to Appellant, on the night of the incident, he was with his brother and a man named "Mike." The three men went to Mr. Lecroix's house to collect money for a drug transaction. Appellant had supplied Mr. Lecroix with drugs to sell. Appellant was carrying a .40 caliber Smith & Wesson. Appellant got to the area, got out of the car, and claimed that Mr. Lecroix fired the first shot. Appellant responded by firing back fifteen times, emptying the magazine of the gun that he was carrying.

Appellant admitted that he was a drug dealer. Further, Appellant even admitted that after his arrest for this incident, he drove to Nashville one day, started drinking, and got into a fight. Appellant was arrested and convicted of DUI as a result of this incident. He was

also charged with evading arrest and assault, but these two charges were dismissed. Appellant confirmed that he was adjudicated delinquent as a juvenile as a result of a vandalism charge. Appellant got probation for this charge.

Appellant acknowledged the seriousness of the offenses at issue during the sentencing hearing and that he endangered the lives of the victims, who were unconnected with the drug transaction.

Appellant expressed remorse for his actions and insisted that he would be able to pay restitution for his "very stupid" actions. At the time of the hearing, Appellant was employed by Music City Moovers and was being homeschooled. Appellant expected to graduate in May of 2009.

Appellant's grandmother, Madi Sparkman, also testified. She informed the court that she would provide Appellant with assistance in paying restitution and would help him in any way necessary if he were to be granted an alternative sentence.

At the conclusion of the sentencing hearing, the trial court stated that it:

> [C]onsidered the evidence presented at trial and at the sentencing hearing. The presentence report. The principles of sentencing and arguments made as to sentencing alternatives. The nature and characteristics and the criminal conduct involved. The evidence and information offered by the parties on mitigating and enhancing factors, if any. Any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee and statements made by the Defendant on his own behalf about sentencing and the Defendant's potential for rehabilitation and treatment.

The trial court then concluded that it considered the following in regard to the decision to grant or deny alternative sentencing:

> The presentence report. The Defendant's physical and mental condition and social history. The facts and circumstances surrounding the offense. The nature of the circumstances of the criminal conduct involved. Prior criminal history of the Defendant. Criminal charges received by the Defendant after the incident referred to. Previous actions and character of the Defendant. Whether or not the Defendant might reasonably be expected to be rehabilitated and the Defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the Defendant might commit

> another crime. Whether or not it reasonably appears that the Defendant will abide by the terms of probation. Whether or not the interests of society in being protected from possible future criminal conduct of the Defendant are great and whether or not measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the Defendant. Whether or not a sentence of full probation would unduly depreciate the seriousness of the offense. Whether or not confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses. Whether or not the offense was particularly enormous, gross, or heinous.

The trial court then denied alternative sentencing. Appellant filed a timely notice of appeal.

Analysis

On appeal, Appellant argues that the trial court improperly denied an alternative sentence. Specifically, Appellant argues that he is a favorable candidate for an alternative sentence and has the potential for rehabilitation. Further, Appellant contends that the trial court, "although repeating all the required statutory considerations, did not make a finding as to how they factored into this case," so this Court should not give the trial court's determinations a presumption of correctness. Consequently, Appellant argues that this Court should grant him an alternative sentence. The State, on the other hand, argues that the record supports Appellant's sentence of confinement.

When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "[T]he presumption of correctness 'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). "If . . . the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails." *Id.* at 345 (citing *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)). The defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, first determines the range of sentence and then determines the specific sentence and the appropriate combination of sentencing alternatives by considering: (1) the

evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts regarding sentences for similar offenses; (7) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b),-103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

When imposing the sentence within the appropriate sentencing range for the defendant:

> [T]he court shall consider, but is not bound by, the following *advisory* sentencing guidelines:
>
> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
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> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(C) (emphasis added). However, the weight given by the trial court to the mitigating and enhancement factors are left to the trial court's discretion and are not a basis for reversal by an appellate court of an imposed sentence. *Carter*, 254 S.W.3d at 345. "An appellate court is . . . bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration. . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6). However, defendants who are classified as Range II or Range III offenders are generally not to be considered as favorable candidates for alternative sentencing. *Id.* A court shall consider, but is not bound by, this advisory sentencing guideline. T.C.A. § 40-35-102(6); *see also Carter*, 254 S.W.3d at 347. Furthermore, with regard to probation, a defendant whose sentence is ten years or less is eligible for probation. T.C.A. § 40-35-303(a).

However, all offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A-C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein pled guilty to two aggravated assaults, class C felonies, an attempted aggravated robbery, a class C felony, and felony reckless endangerment with a weapon, a class E felony. As a Range I, standard offender sentenced to less than ten years in confinement, he was eligible for an alternative sentence, including probation.

It is well-established that the record of the sentencing hearing is part of the record of the case and "shall include specific findings of fact upon which application of the sentencing principles was based." T.C.A. § 40-35-209(c). The purpose of recording the court's reasoning is to guarantee the preparation of a proper record for appellate review. T.C.A. § 40-35-210(e); *State v. Ervin*, 939 S.W.2d 581, 584 (Tenn. Crim. App. 1996).

Here, the record of the sentencing hearing is included in the record on appeal. The trial court recited the considerations required by statute prior to making a sentencing determination. However, the trial court made no findings of fact, the record does not demonstrate how the trial court considered the applicable sentencing laws and principles as pertaining specifically to Appellant's case, and the trial judge did not make specific findings with respect to its denial of probation and community corrections. Consequently, we reverse the judgments of the trial court and remand the case for further proceedings. On remand, specific findings of fact must be made on the record as to Appellant's suitability or lack thereof for probation and/or community corrections.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are reversed and remanded for a new sentencing hearing in accordance with this opinion.

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JERRY L. SMITH, JUDGE